

## APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada  
Charan Banerji.*

1918  
April, 10.

MUHAMMAD ILTIFAT HUSAIN (DECREE-HOLDER), v. ALIM-UN-NISSA  
BIBI AND OTHERS (JUDGMENT-DEBTORS).\*

*Civil Procedure Code (1908), order XXXIV, rule 6—Application for decree over  
against the mortgagor—Limitation—Act No. IX of 1908 (Indian Limitation  
Act), schedule 1, article 181.*

An application for a decree under the provisions of order XXXIV, rule 6, of the Code of Civil Procedure is not an application for the execution of the original decree for sale, but is an application in the original suit for a new decree. Such an application is governed as to limitation by article 181 of schedule 1 to the Indian Limitation Act, 1908, and must be made within three years from the date when the right to apply accrued. *Bihari Lal v. Bisheshar Dayal* (1) referred to.

THE facts of this case were as follows:—

A decree for sale on a mortgage was passed in February, 1906, the mortgaged property consisting of two villages. The mortgagee became entitled to the equity of redemption in one of the villages, with the result that the two interests, that is, the interest of the mortgagee and the interest of the mortgagor, vested in one person. The mortgage, therefore, became discharged to the extent of the value of the property acquired by the mortgagee. In the year 1911 the other village was put up to sale and purchased by the decree-holder. The sale proceeds being insufficient to satisfy the decree, the decree-holder in 1913, made an application for a personal decree under order XXXIV, rule 6, of the Code of Civil Procedure, but this proved infructuous. In 1915, the present application was made, but was dismissed as barred by limitation. The decree-holder appealed to the District Judge, but his appeal was dismissed and the order of the Subordinate Judge confirmed. The decree-holder thereupon appealed to the High Court.

Maulvi *Iqbal Ahmad* and Maulvi *Mukhtar Ahmad*, for the appellant.

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\* Second Appeal No. 296 of 1917, from a decree of W. T. M. Wright, District Judge of Budaun, dated the 22nd of September, 1916, confirming a decree of Kshirod Gopal Banerji, Subordinate Judge of Budaun, dated the 29th of January, 1916.

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Mr. S. A. *Haidar*, and Mr. *Muhammad Yusuf*, for the respondent.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of an application under order XXXIV, rule 6. This rule applies to cases in which after the mortgaged property has been sold the mortgagee comes to court and asks for a personal decree for the balance left due. The rule provides that “where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the court may pass a decree for such amount. In the present case the original mortgage decree was obtained in February, 1906, the mortgage property consisted of two villages. In the events which happened the mortgagee became entitled to the equity of redemption of one of the villages, the result being that the two interests, that is, the interest of the mortgagee and the interest of the mortgagor, vested in one person. This operated to discharge the mortgage to the extent of the value of the property acquired by the mortgagee. In the year 1911 the other village was put up to sale and purchased by the decree-holder. Accordingly, the mortgaged property and all rights in respect of it were exhausted in the year 1911, and it was on this basis that the application for a personal decree was made. The application was made in the year 1915, but there was another application for a similar decree in the meantime (1913). If the present application can be regarded as an application for execution of the original mortgage decree, then perhaps the application which was made in 1913 would save limitation. If on the other hand the present application is not an application for execution of the original mortgage decree but is an application for a fresh decree, then the application should have been made within three years from the time when the right to make such application accrued, and the article which governs the application is article 181 of the Limitation Act. We find it impossible to hold that an application for a decree under the provisions of order XXXIV, rule 6, is an application for the execution of the original decree, which was a decree for the sale of certain property. We think that it is an application in the original suit for a new decree and that it

cannot be regarded as an application in execution. In a somewhat similar case—*Bihari Lal v. Bisheshar Dayal* (1)—Mr. Justice CHAMIER seems to have expressed the view that article 181 governs an application for a decree under order XXXIV, rule 6. In this view the order of the court below dismissing the application was correct, although the reasons for the court's decision may be open to question. We dismiss the appeal with costs.

*Appeal dismissed.*

*Be ore Sir Henry Richards, Knight Chief Justice, and Justice Sir Pramada Charan Banerji.*

MUHAMMAD ILTIFAT HUSAIN (DECREE-HOLDER) v. ALIM-UN-NISSA BIBI AND OTHERS (JUDGMENT-DEBTORS).\*

*Civil Procedure Code (1908), order XXXIV, rule 6—Order rejecting application for a decree over against the mortgagor—Appeal—Court-fee—"Decree."*

An order on an application for a decree under order XXXIV, rule 6, of the Code of Civil Procedure is a "decree" as that term is defined in the Code. An appeal, therefore, from such an order must bear an *ad valorem* court fee stamp, and not merely a stamp of Rs. 2.

In the above appeal the appellant paid Rs. 2 as court fee on his memorandum appeal filed in the High Court having described it as an *execution second appeal*. The following report was thereupon made by the Stamp Reporter:—

"This is an appeal against the decree of the courts below refusing to grant the decree-holder appellant's application for a personal decree under order XXXIV, rule 6, of the Code of Civil Procedure, on the ground that it was time-barred. On the authority of the ruling of this Court to be found in *Tajammul Husain Khan v. Muhammad Husain Khan* (2) an *ad valorem* court fee must be paid both in the lower appellate court and in this Court on the value of the relief sought. Accordingly a court fee of Rs. 295 must be paid in each court on Rs. 5,456, the value of the appeal in each court. A court fee of as. 8 having been paid in the lower appellate court and of Rs. 2 in this Court, there is therefore a deficiency of Rs.  $295 \times 2 =$  Rs. 590, minus Rs. 2-8-0 = Rs. 587-8-0."

\* Stamp Reference in S. A. No. 296 of 1917.

(1) (1912) 9 A. L. J., 569.

(2) (1913) 14 A. L. J., 328.

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Objection having been taken to the above report the question was referred to the Taxing Officer, who ordered the matter to be laid before the Bench hearing the appeal.

The following order was thereupon passed.

RICHARDS, C. J., and BANERJI, J.:—A report has been submitted by the office that the appellant was liable for additional court fees in the lower appellate court calculated upon the value of the subject matter of the appeal. The application was for a decree under order XXXIV, rule 6, made in the original mortgage suit. The application, of course, could be made on an 8 anna stamp, but the question is what should the fee be which either side would have to pay if they were dissatisfied with the ruling of the court to which the application was made. In the present case the court made an order dismissing the application for a decree under order XXXIV, rule 6. In the case of *Tajammul Husain Khan v. Muhammad Husain Khan* (1) Mr. Justice TUDBALL held that the defendant against whom a decree under order XXXIV, rule 6, had been made was obliged to pay an *ad valorem* court fee on the decree which had been made against him. The learned Judge was of opinion that the decision appealed against was clearly a "decree" within the meaning of the Code of Civil Procedure. We think that the view taken by Mr. Justice TUDBALL was correct. The only difference between that case and the present is that the court of first instance instead of granting a decree under order XXXIV, rule 6, refused to make such decree. We think that an order refusing to make a decree under order XXXIV, rule 6, must be regarded as a "decree" within the meaning of the definition of that term in the Code of Civil Procedure. We think that the report of the office as to the liability of the appellant for payment of *ad valorem* court fees in the first appeal was correct and that the amount must be paid by the appellant.

*Order accordingly.*

(1)(1913) 14 A. L. J., 323.